UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SEA BREEZE HEALTH CARE CENTER, INC.

and **Cases 15–CA–14273**
15–RC–8042

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL UNION NO. 1657, AFL-CIO

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DECISION

I. Statement of the Case

1. JERRY M. HERMELE, Administrative Law Judge. On April 17, 1997, the United Food and Commercial Workers Union, Local Union No. 1657, AFL-CIO (the Union), lost an election, by a vote of 37 to 42 (with one disputed ballot), to organize the unskilled employees at a nursing home in Mobile, Alabama. The Union filed unfair labor practice charges and objections[1] to the election result, alleging various campaign irregularities and requesting that the outcome be set aside. On June 30, 1997, the General Counsel filed a complaint against the Respondent, Sea Breeze Health Care Center, Inc. (Sea Breeze), alleging various violations of Section 8(a)(1) and (3) of the National Labor Relations Act. These alleged violations involved interrogations, polling, surveillance of and promises to employees before the

[1] Charges were filed on March 27, May 31, and June 19, 1997, and objections were filed on April 23, 1997.

election, the elimination of overtime for one employee before the election, and the interference with the work of two employees on election day. Sea Breeze generally denied these allegations in its July 11, 1997 answer. Then, on July 30, 1997, both the General Counsel's complaint and the Union's objections were consolidated for a hearing.[2]

2. This case was tried from October 14-17, 1997, in Mobile, Alabama, during which the General Counsel and Union called 10 witnesses, and Respondent called 11 witnesses. During the hearing, the Union withdrew Objection 5(c). And after the hearing, the Respondent and General Counsel filed briefs, on December 5 and 7, respectively.

II. Findings of Fact

3. Capitol Care Management Company, Inc.[3] (Capitol Care), based in Atlanta, Georgia, operates approximately 120 nursing homes and 60 retirement centers, the vast majority of which are not unionized and are located in the southern United States (Tr. 519, 826). In June 1994, it purchased the Sea Breeze nursing home in Mobile, Alabama (Tr. 812). The facility was closed in 1994 but it was relicensed, and reopened by Capitol Care in January 1995 (Tr. 696). In 1996 Sea Breeze derived gross revenues over $100,000 and purchased/received over $50,000 in goods from outside Alabama (G.C. Ex. 1(j)).

4. Other than the management and administrative staff, the Sea Breeze workers are skilled and semiskilled, such as registered nurses (RNs) and licensed practical nurses (LPNs). Then, there are the unskilled workers such as certified nursing assistants (CNAs) (also known as nurse's aides) and laundry/housekeeping workers, almost all of whom are black women.

5. It is these unskilled workers that the Union attempted to organize in its campaign which commenced on February 27, 1997, when the Union organizer, Juleeann Jerkovich, presented the Sea Breeze administrator, Anne Kogelschatz, with a letter announcing the Union's intention (Tr. 696-97). Jerkovich is a veteran of many campaigns to organize nursing home workers in the South (R. Ex. 5).

6. George Hunt was the Sea Breeze "Human Resources"

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[2] The Regional Director approved the Union's withdrawal of Objections 1(b) and 1(d). Also, he noted that Objections 1(a), 1(c), 1(e), 2(a), and 2(b) were concurrent with the General Counsel's unfair labor practice allegations.

[3] Capitol Care's parent, Retirement Care Associates, is the actual owner of the Sea Breeze facility. Capitol Care manages the facility (Tr. 507). Capitol is misspelled "Capital" in the transcript.

supervisor in early 1997 (Tr. 507). He and Ron Smith, Capitol Care's regional director for Alabama and Georgia, were in charge of Respondent's opposition to the Union's election campaign (Tr. 545, 811). Hunt had experience in six prior union organizing campaigns and, as such, instructed the Sea Breeze department heads on the dos and don'ts of dealing with employees during the campaign. For example, Hunt told them that they could not threaten or interrogate employees, spy on employees, or make promises to employees. However, it was permissible to "provide information about the union to employees" (Tr. 546-47, 557-58). Hunt himself would talk to an employee about the Union if he happened to meet one in the hallway, for example (Tr. 577). Kogelschatz also talked to prounion employees in an attempt to persuade them to vote against the Union (Tr. 771).

7. According to Hunt, some Sea Breeze employees were bothered by union supporters visiting their homes after work (Tr. 507-08). So, upon complaining to Hunt and Kogelschatz (Tr. 736), management prepared the following flyer for distribution to Sea Breeze employees (Tr. 820):

> DON'T BE COMING AROUND MY HOUSE
>
> THE LABOR BOARD MADE THE COMPANY GIVE A LIST OF EMPLOYEES NAME AND ADDRESSES FOR THE VOTE, BUT. . . .
>
> THAT WAS NOT AN INVITATION TO COME BY MY HOUSE FOR A "FRIENDLY VISIT" TO PRESSURE ME ABOUT THE UNION.
>
> THIS IS TO PUT YOU ON NOTICE THAT YOU ARE NOT WELCOME AND I WANT YOU TO STAY AWAY FROM MY HOME AND STAY AWAY FROM ME.

_____

(G.C. Ex. 3). Smith told the supervisors to place the flyers on nurse's stations and breakrooms in the facility, but not to distribute them to employees "personally" (Tr. 812). Hunt also posted one of the flyers on the first floor bulletin board. The flyers were not to be returned by employees to management. Rather, according to Hunt, the flyer was supposed to be given by any employee who wished one directly to the Union (Tr. 509-10). According to CNA Deandrea Wilson, a Sea Breeze supervisor may have passed out the flyer directly to employees (Tr. 216-223). CNA Teresa Bell testified that LPN Veronica Whisby (now Veronica Roberson) told her that the flyer was supposed to be returned to Kogelschatz. Whisby indicated her prounion sentiments to Bell. Bell then asked Whisby for a bunch of flyers and promptly threw them in the trash, with Whisby's knowledge (Tr. 346-47, 803).

8. Another company campaign tactic was the "Union Truth Quiz." Hunt, Smith, and Kogelschatz prepared this "tongue-in-cheek" document for placement at the nurse's stations and in the employee breakroom (Tr. 510-12, 820). The Quiz consisted of 17 questions with a distinct antiunion flavor, to be submitted by April 16, 1997, and a line for the employee's name. The prize for completing the Quiz was $1,427.60, which would be donated to the winning employee's church or charity. The $1,427.60 represented "the same amount the Union wants to collect in dues from our employees each and every month." (G.C. Ex. 2). Only one laundry employee, Phalisa Smith, submitted the answers to the Quiz. After the election, management announced that Smith won the $1,427.60 and Sea Breeze donated that amount to her church (R. Ex. 6; Tr. 513, 586, 596-98).

9. During the election campaign, Hunt hired Reverend David Jones, a black labor relations consultant, whose campaign record for employers was 615 victories and only 10 losses. Jones instructed Sea Breeze management on campaign strategy. According to Hunt and Kogelschatz, Jones never wore a clerical collar at the facility nor discussed religion (Tr. 521-26, 576-77, 714, 717). However, housekeepers Virginia Morrissette and Tondelayo Seals, and CNAs Deandrea Wilson, Teresa Bell, and Evelyn Wooten testified that Jones wore a clerical collar while talking with the employees about the bad aspects of unions (Tr. 34, 101-03, 185, 416-17, 478).

10. In January 1997, Sun Health Care (Sun) signed a letter of intent to purchase Retirement Case Associates, including the Sea Breeze nursing home.[4] Hunt invited Sun's personnel director, Connie Johnson, to speak to the Sea Breeze employees before the election to ease their anxiety about the acquisition, which was scheduled to occur in June 1997 (Tr. 105, 514-16). "Give Sun a Chance" buttons were worn by some antiunion employees during the campaign (Tr. 36-37). Other employees wore prounion buttons (Tr. 111). Johnson met with the employees before election day and was asked several times in the meetings about what specific benefits Sun would provide to the employees when Sun took over. According to laundry employee Lewis Taylor and CNAs Bell and Wooten, Johnson declined to give specifics, saying only that Sun would provide "better" dental and insurance benefits, "better" health care and "better" working conditions. In sum, Johnson told the employees to "give Sun a chance" (Tr. 250-51, 350-52, 476). But some employees were disappointed when Johnson failed to provide specifics (Tr. 517). However, according to Kogelschatz, Johnson did not even use the word "better" to respond to questions about Sun's benefits (Tr. 734-35). And housekeeper Tondelayo Seals got

[4] Sun is based in Albuquerque, New Mexico, and owns nursing homes in the United States, Canada, and Great Britain (Tr. 518-19).

the "impression" that Sun's benefits would be better, notwithstanding Johnson's refusal to be specific (Tr. 124-25). Also at this meeting, Johnson showed an antiunion videotape which stated that unions are violent and turn employees against each other (Tr. 399-402).

11. As discussed supra, Sea Breeze management had discussions with the employees during the election campaign about the Union. For example, housekeeper Seals was told by management that she had the right to join a union (Tr. 122). On the other hand, Kogelschatz met with several CNAs in late February or early March 1997 and stated that "for the Union to come up in there, somebody had to participate to get them up in there. . . ." According to CNA Bell, Kogelschatz had "a book, a tablet, in her hand" at this meeting. After Kogelschatz's statement, Bell revealed that she was "a card signer" for the Union (Tr. 344-45). The next day, RN Netha Johnson asked Bell how she felt about the Union, in the presence of several other people, whereupon Bell reiterated her prounion stance to Johnson. Johnson stated that management instructed the RNs to talk to the CNAs about the Union. Johnson then told Bell about the pros and cons of a union but revealed that she (Johnson) was prounion too (Tr. 342-43, 610-12).

12. In March 1997, payroll clerk Martha Fredrickson was instructed by Kogelschatz to talk to five employees about Sun and to distribute "Give Sun A Chance" buttons and copies of the union constitution and bylaws (Tr. 427, 442-45). Fredrickson does not attend management meetings and does not supervise any employees. In this regard, she does not hire, fire, discipline, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or adjust the grievances of any employee (Tr. 438, 448-50). Also in March, Fredrickson asked CNA Deandrea Wilson "How do you feel about this thing going on?" Wilson replied, "Well, what thing you talking about," to which Fredrickson replied "This union thing." (Tr. 179-81). At the time, Wilson did not yet wear a union button. A few days later, maintenance supervisor Jessie Smelly, who did not usually talk to her, asked her "How do you feel about this thing going on?" She replied "What thing,?" wanting Smelly to use the word "union" because Wilson knew this was not permitted. Finally, Smelly replied "This union stuff." Smelly stopped talking when other people came by, and then when he and Wilson were again alone he added "There's going to be a lot of static around here if we get that union in." Wilson was not wearing a union button during this talk with Smelly (Tr. 208-14).[5]

[5] Smelly does not remember Wilson or any conversation with any employee about the Union (Tr. 685).

13. Joseph Chestang is the director of housekeeping and laundry at Sea Breeze. On February 28, 1997, Kogelschatz called a meeting of supervisors to find out what they knew about the Union. After the meeting, Chestang asked one of his employees, Azerita Bryant, if she "heard anything about a union campaign trying to get in there." Bryant said yes and added that Damon Simon was helping the Union. The next day, before he received any training from management about what he could or could not do during an election campaign, Chestang called a meeting of his employees and asked all of them if they had "any knowledge of a union trying to get in." Chestang then asked Simon, a floor cleaner, if he had signed a union card and whether Simon was giving employees rides to union meetings. Simon told Chestang no to both questions (Tr. 133-35, 652-56). Simon later wore a union button and handbilled for the Union (Tr. 138). Chestang also spoke with housekeeper Seals, asking her "did I know anything about the union." Seals said no. At this point, she had not revealed her prounion position to management yet. Later, Chestang again spoke with Seals, telling her that he was "highly disappointed in me" for supporting the Union and not telling him (Tr. 79-83, 98, 665). In March, Seals started handbilling for the Union and wearing a union button (Tr. 99, 111).

14. During the campaign, Lewis Taylor, a laundry worker on the 5 a.m. to 1 p.m. shift, wore a prounion button. Chestang told him he was surprised to see him wearing a union button and if he had a problem he should have come to Chestang (Tr. 237-40). Before this conversation with Chestang, Taylor substituted about twice a month for Katrina Smith, who worked the midnight-5 a.m. shift and often called in sick. Smith would call Taylor, who would then call Chestang to receive permission to come in early and work the overtime (Tr. 241). As a general rule, however, overtime is discouraged at Sea Breeze (Tr. 663, 812-13). Indeed, in late 1996 an internal Sea Breeze memorandum warned that "overtime. . .must be controlled." (R. Ex. 17). Thus, if it is necessary to cover an open shift, it is preferable to use an employee whose additional hours would not create the need to pay overtime. But, unlike nursing duties, management does not consider it essential always to fill a vacant laundry shift (Tr. 700-01). And because there are few laundry employees it is difficult to find replacements (Tr. 280-81, 702). After Taylor started wearing a union button, Chestang denied Taylor's request for overtime. This was Chestang's first such denial of Taylor's request. As it turned out, nobody covered the vacant shift. After the April 17, 1997 election, Chestang denied his request again, stating that he needed to cut down on overtime (Tr. 241-43, 275). Thereafter, Chestang simply told Taylor to come in an hour or two early if Smith called in sick again (Tr. 277). According to Chestang, the denial of Taylor's requests for overtime had nothing to do with Taylor wearing a union button (Tr. 664). Rather, Chestang stated that he turned Taylor down

because Taylor was covering for Smith without his permission and because Chestang's supervisor was complaining about excessive overtime (Tr. 672, 681). From January 1996 to mid-1997, there was very little overtime approved in the laundry department. Specifically, only 71 hours of overtime were approved in the six-month tenure of Taylor, constituting just 1.2 percent of the total hours worked in the department (R. Ex. 15).

15. During the campaign both the Union and Respondent passed out campaign literature (G.C. Exs. 4, 5, 7; R. Exs. 1, 3-4, 9-10, 12-14). One antiunion handbill stated that "[Jerkovich] and your helpers promote racism." (U. Ex. 2).

16. Election day was April 17, 1997 and the polls were open from 6:45 to 8:30 a.m., and from 3:00 to 4:00 p.m. (Tr. 356). Voting took place on the first floor of the facility across from a nurse's station (Tr. 357). According to personnel director Hunt, it was difficult to keep the employees focused on their work that day and he anticipated that some employees would want to leave a little early (Tr. 534-35, 564). So, Hunt told the LPNs to instruct the employees not to leave before the end of their 3:00 p.m. shifts so that the second-shift employees had a chance to vote and replace the first-shift employees (Tr. 542-43).

17. During the morning vote, the Union hung a sign "Vote Yes" across the street from the nursing home, on non-Sea Breeze property (U. Ex. 1). Union steward Kelly Luker was asked by Respondent's attorney, Dean Rice, to take the sign down because, according to Luker, Rice said it was on Sea Breeze property (Tr. 317-18). Hunt then took a picture of the sign with the consent of one of Jerkovich's associates (Tr. 538-39). Luker did not take the sign down until the morning vote was over. Then she rehung the sign for the afternoon vote (Tr. 320-23). Before the afternoon vote, Hunt obtained a 27-foot long truck and parked it catty-corner in front of the Sea Breeze entrance in order to block the view of the sign from the entrance, as well as to block some of the noise coming from the union supporters near the sign. Hunt conceded, however, that the truck idea did not work well (Tr. 535-38, 541). In that regard, the union supporters moved elsewhere with their sign. And the truck moved after the voting started (Tr. 296-98).

18. In between the voting sessions, Chestang told Taylor to clean up a storeroom and watched him do so for the 15 minutes that it took (Tr. 244-45). Although cleaning the storage room was not usually part of his job, Taylor had done it before (Tr. 282-83). When Taylor was done, Chestang told him and another employee, Phalisa Smith, to gather laundry upstairs, after learning of a laundry shortage in the facility. Chestang accompanied both Taylor and Smith on the laundry hunt and helped

them (Tr. 656-58, 669). According to Taylor, this was the only time during which Chestang "followed" him as he worked (Tr. 245-47, 286-87). According to Smith and Chestang, these laundry hunts occurred about once a week, took about an hour, and normally included Chestang as well as the hunters (Tr. 586-88, 599-600, 657-58). After the hunt was over, someone from the Union called Hunt to complain about Chestang. Hunt contacted Kogelschatz, who talked with Chestang. But Chestang denied doing anything improper (Tr. 561-62).

19. Before the 3:00 p.m. vote, CNA Bell, who was a union observer, saw Mark Havard and Hugh Ash near the voting area. Havard is the rehabilitation director at Sea Breeze but is not employed by the nursing home directly. Ash is Havard's boss. Bell was stationed in the voting room as the voting session began and could see Havard and Ash talking at the nurse's station directly across from the voting room. Either Havard or Ash was on the telephone. Bell notified the Board agent, Nora Flaherty, about the presence of the two men, whereupon Flaherty approached the two men and asked them to leave the area. Havard did not take part in the Respondent's campaign and was not even sure when the voting was scheduled that day. They left immediately when asked to do so by the Board agent (Tr. 360-62, 411-13, 602, 614-21. No voters were yet present in the area and the Board Agent submitted no memorandum about the matter (Tr. 693-94).

20. As the See Breeze administrator, Kogelschatz walked around the facility a lot on "compliance rounds" (Tr. 705). Virginia Morrissette and Tondelayo Seals worked their regular 7:00 a.m. to 3:00 p.m. second-floor housekeeping shifts on April 17, 1997. Customarily, they would leave the second floor on the elevator with their cleaning carts at 2:45 p.m., put the carts away on the first floor, and wait to clock out at approximately 2:53 p.m. Although their shifts do not end until 3:00 p.m., a seven-minute early clockout was allowed by Fredrickson, the payroll clerk, because the housekeepers would come in seven minutes before 7:00 a.m. and/or it did not look good to have a bunch of people milling around the timeclock between 2:53 and 3:00 p.m. waiting to clock out (Tr. 20-22, 48-52, 61-62, 797). Kogelschatz was aware of this practice and she told Chestang to tell his people to stop it (Tr. 766).

21. Morrissette and Seals both wore union buttons on election day. Both women had voted in the morning session that day (Tr. 26-27, 89-90). Seals' lunch was supposed to start at 12:15 but it was delayed until 12:30 p.m. But this had happened before and since April 17, 1997 (Tr. 111-15). Later that day, however, as they were preparing to take the elevator downstairs at 2:45 p.m., Kogelschatz, who was also on the second floor, noticed that the front of the nurse's station was "absolutely filthy" (Tr. 709). According to Kogelschatz, certain employees

were "slacking off" before election day. Kogelschatz warned no employee, however, before April 17 about slacking off (Tr. 708, 741). But upon spotting Morrissette and Seals at the elevator door, she instructed them to clean the nurse's station. According to Seals, the front wall thereof was clean, but Seals said nothing (Tr. 131). This task took about 10 minutes and was completed at about 2:58 p.m. (Tr. 764). According to Morrissette and Seals, this task took only a few minutes, and was completed at approximately 2:50 p.m., whereupon Kogelschatz told them to wait on the second floor until 3:00 p.m. with nothing to do (Tr. 22-23, 87-88). Kogelschatz denied telling them to stay until 3:00 p.m., estimating that it took until then to finish the job (Tr. 764). Morrissette had already cleaned the nurse's station earlier that day, as was her custom, but it is unclear if she also cleaned the front wall of the station (Tr. 30-31, 129-30). Just before 3:00 p.m., from the second floor window, Morrissette and Seals noticed other employees in the parking lot leaving work (Tr. 24, 88). At least some of those employees were wearing pro-Sun buttons (Tr. 91-92). Finally, Morrissette and Seals went downstairs and clocked out just after 3:00 p.m. (Tr. 52-53, 94-95). The next day, April 18, Kogelschatz called Morrissette and Seals into her office to apologize about the delay and tell them she bore no grudge against them. Then, Kogelschatz hugged both women (Tr. 40-41, 56, 96, 712-13).

22. The Union lost the election by a vote of 37 to 42, with one ballot disputed (G.C. Ex. 1(o)). Hunt and Kogelschatz left Sea Breeze shortly after the election (Tr. 507, 698). As of late 1997, Sun's acquisition of Sea Breeze has still not occurred (Tr. 515). Also as of late 1997, 61 of the 80 voters in the election remain as employees at Sea Breeze (Tr. 650).

III. Analysis

23. The General Counsel's unfair labor practice allegations fall into five broad categories: (a) eight separate interrogations by four different supervisors during the campaign in violation of Section 8(a)(1); (b) two different methods of polling the employees during the campaign, in violation of Section 8(a)(1); (c) the elimination of one employee's overtime in violation of Section 8(a)(1) and (3); (d) the election day harassment of one employee in violation of Section 8(a)(1); and (e) the election day detention of two employees in violation of Section 8(a)(1) and (3). Those union objections to the election that are separate from the General Counsel's unfair labor practice allegations cover seven areas: (a) promises made by Sun to better working conditions; (b) management's use of racist literature against the Union; (c) the impermissible use of religion to defeat the Union; (d) stationing two supervisors near the polls to influence the voting; (e) hindering the ability of prounion employees to campaign on election day while making it

easier for antiunion employees to campaign; (f) blocking the view of, and attempting to remove, a prounion sign on election day, plus restricting union handbilling activity that day; and (g) photographing the prounion sign on election day.

A. Interrogations

24. The Union delivered the election petition to a surprised Sea Breeze administrator, Anne Kogelschatz, on February 27, 1997. Immediately, Kogelschatz met with the various Sea Breeze supervisors to ascertain what they knew about the Union. In that connection, housekeeping supervisor Joseph Chestang endeavored to question his employees. And it is this series of interrogations that is most damaging to Respondent's case.

25. Specifically, the evidence clearly shows, and indeed Chestang admits, that he called a meeting of his six or so employees on approximately February 27 and asked them if they had "any knowledge of a union trying to get in." Then, he asked Azerita Bryant, in a separate encounter, if she "heard anything about a union campaign trying to get in . . . ." Upon learning about Damon Simon from Bryant, he then questioned Simon if he had signed a union card and was giving employees rides to union meetings. Next, Chestang talked to Tondelayo Seals twice, first asking her if she knew anything about the Union, and later, after learning of Seals' prounion status, telling her that he was "highly disappointed" in her for supporting the Union and not telling him. The General Counsel correctly points out that, regarding all of these interrogations, Chestang failed to communicate a valid purpose to his employees or assure them that there would be no reprisals for their answers or lack thereof. Respondent, however, contends that Chestang's actions were friendly "casual interactions" with his close-knit housekeeping unit, were merely generated by his "curiosity," and did not contain any threats.

26. In determining whether an interrogation of an employee violates Section 8(a)(1), the totality of the circumstances must be considered. Blue Flash Express, 109 NLRB 591 (1954). Thus, the place and method of the interrogation, the background thereof, the nature of the information sought and the identity of the questioner are all important factors to evaluate. Rossmore House, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Before February 1997 there is no history of Respondent's hostility or discrimination against union supporters. Also, Chestang's group interrogation, later separate questioning of Bryant and first separate questioning of Seals were general and nonthreatening: did they know anything about a union? See Sunnyvale Medical Clinic, 277 NLRB 1217 (1985). Also, these incidents occurred very early in the election campaign and did not take place in a closed setting such as Chestang's office, for example. Compare Basin Frozen Foods, 307 NLRB 1406, 1416 (1992). On the other hand, none of the aforementioned interrogatees was yet an open union supporter. Indeed, Simon falsely denied knowing anything about the Union and giving rides to union

supporters, indicating that he was afraid of Chestang's questions. Next, all of these incidents took place at work, and during normal working hours. Further, Chestang's questioning of Simon got very specific about the latter's union activities. And, Chestang's second conversation with Seals constituted a veiled threat: he was "highly disappointed" in her for supporting the Union. Finally, Chestang's initial group meeting smacks of a coercive "systematic" interrogation of his employees. See Custom Window Extrusions, 314 NLRB 850, 855 (1994). Thus, on balance, the Presiding Judge concludes that Chestang's multiple remarks tended to restrain, coerce and interfere with his employees' Section 7 rights. See Hertz Corp., 316 NLRB 672, 684 (1995).

27. Next, RN Netha Johnson interrogated CNA Teresa Bell. Specifically, Johnson asked Bell how she felt about the Union upon orders from upper management to talk to empoyees during the campaign about the pros and cons of the Union. However, Bell was openly for the Union at this point. Further, several other people were present during this conversation and Johnson even told Bell that she was prounion too.

28. The legal standard for determining the coercive nature of an interrogation is an objective, as opposed to subjective, test. Thus, it usually makes no difference whether the interrogatee is an open union supporter and thus whether the employee is actually coerced. Rather, the key inquiry is "whether the questioning tended to be coercive." Heartland of Lansing Nursing Home, 307 NLRB 152, 156 (1992). Under the total circumstances of the Johnson-Bell interrogation, the Presiding Judge concludes that the encounter was not coercive. Johnson was not Bell's immediate supervisor. The conversations occurred in the presence of several people. Johnson already knew of, and indeed shared, Bell's prounion sentiments. There were no threats and the conversation was relatively casual. Thus, on balance, there was no Section 8(a)(1) violation. See Emery Worldwide, 309 NLRB 185, 186 (1992).

29. Payroll clerk Martha Fredrickson asked another CNA, Deandrea Wilson, "How do you feel about this thing going on?. . . This union thing." Wilson was not yet a union supporter and she replied "What thing?" At the outset, while it is clear that Fredrickson is not a supervisor, the General Counsel still argues that her statement is unlawful because, as a payroll clerk with independent judgment, she is Respondent's "agent;" a status Respondent does not deny. Again applying the totality of the circumstances test, the Presiding Judge finds no violation of the Act. Logically, Fredrickson's lesser agent status reduces the coerciveness factor. Moreover, Fredrickson's question to Wilson was extremely general. Thus, it cannot be said that her remark was specifically calculated to elicit a declaration from Wilson about her union sentiments. See NLRB v. McCullough Environmental

Services, Inc., 5 F.3d 923 (5th Cir. 1993).

30. The final interrogation involves Wilson and maintenance supervisor Smelly, who usually did not talk to her but did ask her how she felt "about this thing going on." Wilson, who was a closeted union supporter, egged Smelly on to use the word "union" which he finally did. Smelly stopped talking when other people walked by but continued when they were alone to add that "There's going to be a lot of static around here if we get that union in." The totality of the circumstances, however, shows no unlawful interrogation by Smelly. Significantly, Wilson's conduct smacks of entrapment. Also, Smelly is not Wilson's direct supervisor and, in the Presiding Judge's view, his "static" remark is too vauge to constitute any kind of a threat.

B. Polls: Flyer and Quiz

31. The General Counsel alleges that the "Don't Be Coming Around My House" flyer was an unlawful attempt to poll the employees before the election inasmuch as only antiunion employees would presumably be interested in taking the flyer. In support of this allegation, it is contended that LPN Whisby once told CNA Bell that, if she took one, the flyer would have to be returned directly to Kogelschatz. Also, the General Counsel points out that the flyer contained a signature line.

32. If this flyer consituted an impermissible preelection poll it was certainly a remarkably unsuccessful one. The record evidence reveals absolutely no information that Respondent gleaned from this "poll" about its employees. Indeed, other than CNA Bell, who threw a bunch of flyers in the trash, there is no evidence that a single employee took the flyer, much less that Respondent tracked who took a flyer and who did not. Moreover, the flyer was left at various nurses' stations as opposed to being distributed by supervisors to specific employees. Finally, the Presiding Judge accepts personnel director Hunt's credible explanation that the flyer was supposed to be given by the employee directly to the Union. As for Bell's testimony that Whisby told her that the flyer was supposed to be turned in to Kogelschatz, it is significant that Whisby, a credible witness, did not corroborate Bell's verson about the destination of the flyers. Finally, no employee testified that he or she believed that the flyer was supposed to be turned in to management. So, it cannot be concluded that the flyer constituted an impermissible poll or interrogation.

33. Turning to the "Union Truth Quiz," the General Counsel likewise characterizes it as an unlawful preelection poll. By way of summary, the Quiz was a "tongue-in-cheek" antiunion document left at the nurses' stations and breakroom, and was due one day before the election. Unlike the flyer, it elicited one

response: from laundry employee Phalisa Smith, who was declared the winner of the $1,427 prize. According to the rules of the Quiz, that money was then donated to Smith's designated charity after the election.

34. The Quiz presents more problems than the aforementioned flyer because it was designed to be turned in to management before the election and was in fact responded to by one employee. At the outset, it is well-settled that an employer's preelection poll of its employees generally violates Section 8(a)(1). Struksnes Construction Co., 165 NLRB 1062 (1967). The same is true for raffles. And, although an employer's use of a raffle as preelection propoganda is not per se objectionable, Heartwood Avenue Corp., 225 NLRB 719 (1976), all of the circumstances thereof must be evaluated. Here, it is important to consider whether the Quiz, which had aspects of both a poll and raffle, was used to determine employees' sympathies or designed to sway an employee's vote. Accordingly, it is concluded that Respondent may have learned more about Phalisa Smith's union sympathies than it was entitled to know, notwithstanding the lack of any evidence about what her sympathies were.[6] As for whether Smith's vote was swayed, if indeed she voted at all, it cannot be concluded that the $1,427 prize did so. Indeed, direct prizes totalling approximately this same amount have been found to be "not so substantial as to warrant setting aside an election." Sony Corp. of America, 313 NLRB 420 (1993). However, it is concluded that Respondent designed its Quiz to poll its employees and may have learned about the union sympathies of one employee.

C. Harassment of, and Elimination of Overtime for, Lewis Taylor

35. The General Counsel alleges that after laundry employee Lewis Taylor started to wear a prounion button on approximately March 13, 1997, his immediate supervisor, Joseph Chestang, began to retaliate against him. Indeed, Chestang told Taylor that he was surprised to see him wearing the button. First, it is alleged that Chestang stopped assigning Taylor overtime after March 13. Although the written record evidence is unclear as to exactly how much overtime was available to Taylor after March 13, it is clearer from Taylor's testimony that Chestang turned down his request for overtime created by the absence of Katrina Smith twice: March 15 and sometime in late April, after the election (Tr. 242-43). But Chestang had approved Taylor for overtime on February 23, 1997, to cover Smith's absence, and 15 hours of overtime on three occasions in January 1997 for other reasons.

36. Respondent has the better of the argument on the

[6] Smith, however, did testify as a Sea Breeze witness.

overtime issue. To begin with, there was not all that much overtime available in the laundry department during Taylor's tenure: only 71 hours in the six-month period from mid-November 1996 to mid-May 1997. And Taylor covered for Smith only once before March 13. Thus, it cannot be concluded that Chestang's denial of Taylor's two overtime requests after March 13 disrupted a well-established practice of assigning Taylor overtime. Second, Chestang did allow Taylor to work some overtime after April 17 by coming in an hour or two early. Third, it is significant that Respondent assigned overtime to nobody else to cover the shifts missed by Smith. Fourth, Chestang's explanation that he denied Taylor's two overtime requests because of Respondent's policy to reduce overtime is plausible in view of the written evidence produced by Respondent showing management's desire to curb overtime. Hence, the General Counsel has failed to show, by a preponderance of the evidence, that Respondent denied Taylor overtime because of antiunion animus.

37. Turning to the alleged harassment of Taylor by Chestang on election day, Chestang told Taylor to clean up a storeroom, which was usually not part of his job, and watched over him for the 15 minutes it took. Then, Chestang accompanied Taylor and Phalisa Smith on the "laundry hunt" upstairs; a procedure that Taylor testified to as never having happened before or after. The General Counsel alleges that Chestang's actions constituted survillance of Taylor, while Respondent characterizes Chestang's behavior as "supervision of and assistance to" Taylor.

38. Again, the evidence supports Respondent's position. Regarding the storeroom incident, Taylor admitted that he had been required to perform this task previously. As to Chestang's watching of Taylor for the 15-minute period, the evidence is simply insufficient to conclude whether this was unusual. As for the laundry hunt, Phalisa Smith's testimony is significant. Smith corroborated Chestang's position that these hunts were common and normally included Chestang. While the General Counsel intimates that Smith is a witness whose testimony may have been unduly influenced because she won Respondent's "Union Truth Quiz," the Presiding Judge finds her to be a credible witness who gave a thorough rendition of the laundry hunt procedure. Therefore, the preponderance of the evidence fails to establish any surveillance or harassment of Taylor by Chestang.

D. Alleged Dentention of Morrissette & Seals

39. The last unfair labor practice allegation concerns the detention of housekeepers Morrisette and Seals on election day which, according to the General Counsel, prevented these two union supporters from campaigning from 2:45 to 3:00 p.m. Respondent contends that Kogelschatz merely asked Morrissette and Seals "to take a few minutes before the end of their shift to

clean filthy counter tops."

40. The evidence does not support a conclusion that Kogelschatz intentionally detained these two prounion employees for 15 minutes in an effort to prevent them from campaigning between 2:45 and the 3:00 p.m. afternoon voting session. First, there is absolutely no evidence that Morrissette or Seals intended to campaign in this time period. Second, it was common for Kogelschatz to walk around the facility on "compliance rounds." Thus, it cannot be concluded that Kogelschatz was lying in wait for these two women at 2:45 p.m. Third, although Morrissette had cleaned the top of the nurses' station earlier that day, she had not cleaned the "filthy" front of the station. Fourth, while the last-minute cleaning job may have been completed before the stroke of 3:00 p.m., it is also true that Kogelschatz disapproved of CNAs leaving before the end of their regular shifts. Thus, it cannot be said that Kogelschatz's last minute work order was a pretext to delay the two womens' departure. Finally, the "early departure" of other employees that day, some of whom were wearing Sun buttons, is a red herring: there is no evidence that Kogelschatz or other supervisors specifically approved these other departures. Therefore, no impermissible disparate treatment regarding the departure of the first shift employees on election day has been established.

E. The Union Objections

41. As discussed supra, Sun was on track in early 1997 to purchase the Sea Breeze facility. In Objection 3, the Union alleges that Sun representative Connie Johnson,[7] along with Sea Breeze supervisors Kogelschatz, Smith and Hunt, made various promises of "future employee benefits" in the election campaign, plus threats that these benefits would be withheld if the Union won the election. The inquiry on this issue focuses on two matters: the distribution of "Give Sun a Chance" buttons during the campaign, and the statements by Johnson, during preelection group meetings with the employees, that Sun would provide "better" benefits and working conditions.

42. The Union intimates in its objections that the election contest was a Sun versus Union affair. The plain fact though is that Sun is not a named Respondent in this case. And it is well-settled that the Board accords less weight to the conduct of non-parties in determining whether an election should be set aside. Orleans Manufacturing Co., 120 NLRB 630 (1958). Moreover, it is very difficult to conclude that Sun's very general promise to make things "better" was contingent on the Union's loss in the

[7] The Union incorrectly calls her Connie Snyder in the written objections.

upcoming election. Compare Highland Yarn Mills, 313 NLRB 193, 207 (1993) (8(a)(1) violation where supervisor said that if the Union was gone employees would make more money and air quality in plant would improve). Hence, the Union's objections based on Sun's involvement in the campaign will be overruled.

43. The Union next alleges in Objection 4 that Respondent improperly injected race and religion into the campaign. With respect to race, the Union claims that Respondent "distributed literature accusing the union and its agents of promoting racism." The sole evidence of this consists of one of Respondent's antiunion flyers, which states, among other things, that union organizer "[Jerkovich] and your helpers promote racism." The context for this statement is the fact that virtually all of the unskilled Sea Breeze employees are black, while most of management is white. This underwhelming evidence, however, warrants dismissal of this objection. As for the claim that Respondent's use of Rev. Jones in its campaign "used religion to influence the sympathies of the voters," the only evidence thereof is the testimony of five employees that Jones wore a clerical collar while talking to them about the bad aspects of unions. And even this claim is contradicted by Hunt and Kogelschatz, who testified that Jones never wore a clerical collar. Suffice it to say that collar or no collar, the Union's evidence on its religion allegation is insufficient.

44. In Objection 5(a), the Union claims that Respondent stationed supervisors Havard and Ash near the voting areas on election day "to monitor and influence employees while they entered to vote." As the evidence reveals, however, Havard and Ash accidentally entered the general voting area, left immediately when asked to do so, and that no voters were even present when they were there. Accordingly, this objection will be dismissed.

45. In Objection 5(b), the Union claims that antiunion employees were afforded a greater opportunity to campaign on election day than prounion employees. As discussed supra, however, there is no evidence of a policy by Respondent regarding antiunion employees, and insufficient evidence of such a policy regarding prounion employees, including Morrissette and Seals.

46. In Objection 5(d), the Union complains that Respondent interfered on election day in two ways with the prounion sign across from the Sea Breeze facility. First, Union Steward Luker testified that Respondent's attorney asked her to take the sign down on election day. But the sign stayed up. Thus, it is difficult to discern any actual harm to the Union's campaign regarding the sign. Second, Respondent parked a truck on its property to block the view of the sign from the facility's entrance and to reduce the noise coming from the union supporters

around the sign. So, the Union moved the sign. Again, any damage to the Union's campaigning is difficult to discern. Finally, the Union produced no evidence in support of its allegation in this objection that Respondent "restricted access to the Union's handbilling activity. . . ."

47. The Union's final Objection 5(e) claims that Respondent photographed "protected union activity including the union's campaign posters and signs." But the evidence only shows that Hunt took a picture of the union sign with a union supporter's consent. No Sea Breeze employee or union campaigner was photographed. Compare Reno Hilton, 319 NLRB 1154, 1156 (1995). Therefore, there is insufficient evidence to sustain this objection.

F. Summary

48. When an employer violates Section 8(a)(1) during an election campaign, the usual remedy is to order a second election because such prohibited conduct interferes with the "laboratory conditions" of the first election. Dal-Tex Optical Co., 137 NLRB 1782 (1962). The only exception to this policy is where the misconduct is de minimis: "such that it is virtually impossible to conclude" that the election outcome was affected. Super Thrift Markets, 233 NLRB 409 (1977). In this connection, the number of violations, their severity, the extent of dissemination and the size of the unit, are among the relevant factors to consider in determining whether the misconduct warrants setting aside an election result. Caron International, 246 NLRB 1120 (1979).

49. Here, Respondent committed two kinds of 8(a)(1) violations: housekeeping supervisor Chestang's multiple interrogations of his staff and a threat to one employee; and the "Union Truth Quiz." Although the Chestang interrogations occurred very early in the election campaign, one was a very specific request for information about an employee's protected activity and one contained a veiled threat against another employee. As for the Quiz, while it was generally ignored by all employees except one, it constituted an attempted preelection poll of all eligible voters. Further, the closeness of the vote--a five-vote union loss out of 80--also tips the scale in favor of a new election.[8] Compare Caron, supra (one employee out of 850 affected by employer misconduct); Essex International, 216 NLRB 831 (1975) (four-vote margin, only two of 325 employees

[8] The bottom line, however, is that an early second election is unlikely. Continued litigation ensures that. By contrast, an end to legal hostilities means the Union is entitled to a new vote any time after April 17, 1998 (the one-year anniversary of the first vote) provided it obtains an adequate showing of support from the employees.

affected). In sum, while it should be emphasized that the General Counsel and the Union have failed to prove the vast majority of their allegations, the allegations that have been proven are too substantial, and the voting margin too close, to reach any other conclusion.

IV. Conclusions of Law

1. The Respondent, Sea Breeze Health Care Center, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Food and Commercial Workers Union, Local Union No. 1657, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Pursuant to paragraphs 7(a), (b), (c) and (d) of the General Counsel's Complaint, Respondent violated Section 8(a)(1) of the Act by interrogating certain of its housekeeping employees about their union activities, membership and sympathies.

4. Pursuant to paragraph 12 of the Complaint, Respondent violated Section 8(a)(1) of the Act by interrogating and polling its employees with the "Union Truth Quiz."

5. General Counsel has failed to prove its allegations at paragraphs 7(e), 8, 9, 10, 11, 13, 14 and 15 of the Complaint.

6. The Union's Objections 1(a) and 2(b) ARE SUSTAINED.

7. The Union's Objections 1(c), (e), 2(a), 3, 4, 5(a), (b), (d), and (e), ARE OVERRULED.

8. The unfair labor practices and campaign misconduct of Respondent described in paragraphs 3, 4, and 6, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Accordingly, IT IS ORDERED that the Respondent, Sea Breeze Health Care Center, Inc., its officers, agents, successors and assigns, shall:[9]

1. Cease and desist from:

(a) interrogating or polling any employees about their union activities, membership or sympathies;

(b) threatening any employees because of their union activities, membership or sympathies; or

[9] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) in any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Post at its facility in Mobile, Alabama copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, been purchased or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent since February 1997.

(b) File with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[10] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

3. IT IS FURTHER ORDERED that the election held in Case 15--RC--8042 on April 17, 1997 IS SET ASIDE, and that the case IS REMANDED to the Regional Director for Region 15 for the purpose of conducting a new election.

Dated, Washington, D.C. March 24, 1998

Jerry M. Hermele
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten any employees because of their union activities, membership, or sympathies.

WE WILL NOT interrogate or poll any employees about their union activities, membership, or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SEA BREEZE HEALTH CARE CENTER, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1515 Poydras Street, Room 610, New Orleans, Louisiana 70112-3723, Telephone 504-589-6389.